IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.501 OF 2005

Municipal Corporation of
Greter Mumbai ...Appellant

Vs.

Commander Rajnish Bahl
(since deceased)
Mohnish R. Bahl ...Respondent

Mr.N.V.Walavalkar with Ms V.K.Khatu for the Appellant
Mr.M.A.Rochiramani i/b M/s.Rochi & Rochi for the Respondent.

CORAM: A.S.OKA, J.
DATED: MAY 3,2005.

P.C.:

1. Admit. Respondent waives services. Considering the facts and circumstances of the case, taken up for hearing forthwith.

2. The Appeal is by the original Defendant-Mumbai Municipal Corporation for challenging the impugned Judgment and Order dated 27-28th July 2004 passed by the Trial Court by which Notice of Motion filed by the Respondent-Plaintiff has been made absolute in terms of prayer clause (a).

3. Shri Walawalkar appearing for the Appellant submitted that at the time of hearing of the Notice of Motion for temporary injunction, issue of jurisdiction of the Civil Court to entertain the suit on the basis of bar created under Section 149 of M.R.T.P.Act, 1966 was specifically agitated. He submitted that without framing the said issue and without deciding the same the learned Trial Judge has proceeded to

finally decide the Notice of Motion for temporary injunction. He submitted that the procedure followed by the the learned Trial Judge was contrary to law.

4. The learned Counsel for the Respondent submitted that the issue of jurisdiction was not specifically agitated in the written statement filed by the Appellant. The issue of jurisdiction has been expressly kept open and hence no interference is called for.

5. I have considered the rival submissions. Under Section 9(A) of Code of Civil Procedure, 1908 if at the time of hearing of interim application, issue of jurisdiction is raised by the Defendant, the court is under an obligation to frame the issue and to decide the same as preliminary issue after giving an opportunity to the parties to lead the evidence. From the impugned order it does appear that the issue was raised at the time of hearing. In my view the learned Trial Judge has not followed the mandate of Section 9(A) of the said Code. He ought to have framed the issue of jurisdiction and tried the same as a preliminary issue as required under Section 9(A) of the said Code. Hence a case is made out for setting aside the impugned order and for directing the learned Trial Judge to frame the preliminary issue and decide the same. Till the time the preliminary issue is decided and for a period of 15 days thereafter, the Respondent will have to be protected.

6. Hence I pass the following order :

i) The impugned Judgment and Order dated 27-28th July 2004 is quashed and set aside. Notice of Motion No.2963 of 2003 is restored to file.

ii) The learned Trial Judge will frame and decide the issue of jurisdiction in accordance with Section 9(A) of the said Code after giving an opportunity to both the parties to lead the evidence.

iii)If the issue of jurisdiction is decided in favour of the Respondent, the learned Trial Judge will thereafter proceed to decide pending Notice of Motion in accordance with law.

iv) The learned Trial Judge will decide the issue of jurisdiction expeditiously. Till the decision on the issue of jurisdiction and for a period of two weeks thereafter, there will be a ad-intrim order in favour of the Respondent in terms of prayer clause (a) of Notice of Motion No.2963 of 2003 subject to modification which is set out by the learned Trial Judge in paragraph No.16 of the impugned Judgment and Order.

v) Appeal is partly allowed with no order as to costs.

Judge.